



UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 JEFF HOHLBEIN, } 3:08-cv-00347-BES-VPC
11 Plaintiff, }
12 v. } ORDER
13 MARSTON, INC., d/b/a/ "THE GENERAL }
14 STORE," UTAH LAND RESOURCES LLC, }
15 and DOES ONE through FIFTY, inclusive, }
Defendants. }

16 On January 23, 2009, Defendants filed a Motion for Summary Judgment (#12). Plaintiff
17 Jeff Hohlbein ("Hohlbein") filed an Opposition (#15) on February 24, 2009 and Defendants did
18 not file a reply. On June 3, 2009, Plaintiff filed a Motion for Summary Judgment (#16).
19 Defendants did not file an opposition, nor did they seek an extension of time in which to do so.
20 Accordingly, Hohlbein filed a Reply (#17) on June 25, 2009, in which he requests that
21 judgment be entered against Defendants on the grounds that Defendants failed to oppose the
22 summary judgment motion, no genuine issues of material fact remain to be resolved, and
23 Plaintiff is entitled to judgment as a matter of law.

24 I. BACKGROUND
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26 Plaintiff uses a wheelchair due to a condition known as fibrodysplasia ossificans
27 progress. On March 23, 2008, Plaintiff visited The General Store, a small convenience store
28 and gas station located in Moundhouse, Nevada, and encountered a restroom that was
inaccessible to persons with disabilities, as well as other accessibility barriers. Based on this

1 alleged denial of full and equal access to a public accommodation, on June 24, 2008 Plaintiff
 2 filed a Complaint against Defendants, the property owner and operator of The General Store,
 3 seeking to enjoin them from violating Title III of the Americans with Disabilities Act ("ADA"), 42
 4 U.S.C. § 12101, et seq. According to Hohlbein, Defendants have violated the ADA by failing
 5 to remove the architectural barriers to access which were encountered when he visited The
 6 General Store.

7 II. ANALYSIS

8 A. Legal Standards

9 Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers
 10 to interrogatories, and admissions on file, together with the affidavits, if any, show that there
 11 is no genuine issue as to any material fact and that the moving party is entitled to judgment
 12 as a matter of law." Fed.R.Civ.P. 56(c). The burden of demonstrating the absence of a
 13 genuine issue of material fact lies with the moving party, and for this purpose, the material
 14 lodged by the moving party must be viewed in the light most favorable to the nonmoving party.
 15 Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Martinez v. City of Los Angeles, 141
 16 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the
 17 litigation and requires a trial to resolve the differing versions of the truth. Lynn v. Sheet Metal
 18 Workers Int'l Ass'n, 804 F.2d 1472, 1483 (9th Cir. 1986); S.E.C. v. Seaboard Corp., 677 F.2d
 19 1301, 1306 (9th Cir. 1982).

20 Once the moving party presents evidence that would call for judgment as a matter of
 21 law at trial if left uncontested, the respondent must show by specific facts the existence of
 22 a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "[T]here
 23 is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury
 24 to return a verdict for that party. If the evidence is merely colorable, or is not significantly
 25 probative, summary judgment may be granted." Id. at 249-50 (citations omitted). "A mere
 26 scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which
 27 the evidence is reasonably susceptible; it may not resort to speculation." British Airways Board
 28 v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978); see also Daubert v. Merrell Dow

1 Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993) (“[I]n the event the trial court concludes that
 2 the scintilla of evidence presented supporting a position is insufficient to allow a reasonable
 3 juror to conclude that the position more likely than not is true, the court remains free . . . to
 4 grant summary judgment.”). Moreover, “[i]f the factual context makes the non-moving party’s
 5 claim of a disputed fact implausible, then that party must come forward with more persuasive
 6 evidence than otherwise would be necessary to show there is a genuine issue for trial.” Blue
 7 Ridge Insurance Co. v. Stanewich, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing Cal.
 8 Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir.
 9 1987)). Conclusory allegations that are unsupported by factual data cannot defeat a motion
 10 for summary judgment. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

11 The failure of an opposing party to file points and authorities in response to any motion
 12 shall constitute a consent to the granting of the motion under Local Rule 7-2(d). However, the
 13 absence of opposition to a motion for summary judgment does not change the moving party’s
 14 burden of proof. See Marshall v. Gates, 44 F.3d 722, 724 (9th Cir. 1995). “A nonmoving
 15 party’s failure to comply with local rules does not excuse the moving party’s affirmative duty
 16 under Rule 56 to demonstrate its entitlement to judgment as a matter of law.” Martinez v.
 17 Stanford, 323 F.3d 1178, 1181 (9th Cir. 2003). The Court has fully considered Plaintiff’s Motion
 18 for Summary Judgment, the evidence presented, and applicable law. Plaintiff has affirmatively
 19 demonstrated his entitlement to summary judgment by showing that there is no genuine issue
 20 of material fact and he is entitled to judgment as a matter of law as to the allegations made
 21 against Defendants. As such, Plaintiff’s Motion for Summary Judgment is granted and
 22 Defendants’ Motion for Summary Judgment is denied.

23 **B. Plaintiff’s ADA Claim**

24 Title III of the ADA prohibits places of public accommodation from discriminating against
 25 disabled individuals. 42 U.S.C. § 12182(a). The ADA prohibits many specific types of
 26 discrimination, including the “failure to remove architectural barriers . . . where such removal
 27 is readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). If a place of public accommodation fails
 28 to remove architectural barriers where such removal is readily achievable, the ADA provides

1 for a private right of action. 42 U.S.C. § 12188(a)(1). Only injunctive relief is available as a
2 remedy under Title III of the ADA, including an injunction requiring the defendant to alter
3 facilities to make such facilities "readily accessible to and usable by persons with disabilities,"
4 or, where appropriate, "requiring the provision of an auxiliary aid or service, modification of a
5 policy, or provision of alternative methods." 42 U.S.C. § 12188(a)(2).

6 Defendants move for summary judgment on the grounds that: (1) Plaintiff's ADA claim
7 has been resolved because the alleged architectural barriers have been remedied; and (2)
8 the Court should not award attorney's fees to Plaintiff in this case. However, Defendants have
9 presented no evidence to support their contention that the barriers identified by Plaintiff have
10 been removed. Furthermore, in support of his summary judgment motion, Plaintiff submits
11 the declaration and expert witness report of C. Jeffery Evans, identifying the barriers existing
12 at The Grocery Store as of February 18, 2009. (Motion (#16), Ex. 1 of Ex. C). The Court finds
13 that the barriers identified by Plaintiff's expert constitute violations of the ADA. Plaintiff also
14 provides evidence that Defendants have conceded that removal of all barriers to access is
15 readily achievable. (Motion (#16), Ex. E).

16 Defendants have not presented any evidence from which a reasonable trier of fact
17 could determine that removing the identified barriers to access is not readily achievable. For
18 the foregoing reasons, there is no genuine issue of material fact as to whether Defendants
19 have violated the ADA by failing to remove the barriers. Accordingly, the Court grants
20 Plaintiff's request for an injunction requiring Defendants to remove the barriers to accessibility
21 at The Grocery Store.

22 III. CONCLUSION

23 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary
24 Judgment (#16) is GRANTED. Accordingly, Plaintiff's request for injunctive relief is GRANTED
25 and Defendants are ordered to remove the barriers to accessibility identified by Plaintiff's
26 expert within ninety days of the entry of judgment.

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1 IT IS FURTHER ORDERED that Defendants' Motion for Summary (#12) is DENIED.
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2 The clerk of the court shall enter final judgment accordingly.

3 DATED: This 30th day of July, 2009.

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10 UNITED STATES DISTRICT JUDGE
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